In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-368

CAROLYN ROBERTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On November 21, 1972 petitioners filed suit against the United States for the wrongful death of the navigator of a private cargo airplane which crashed on July 27, 1970 in navigable waters 1500 to 1900 feet short of the runway at the Naha Air Base, Okinawa. As amended, petitioners' complaint alleged that United States Air Force personnel on the base negligently directed the landing of the plane and the subsequent unsuccessful efforts to rescue its crew. The amended complaint characterized petitioners' claims as "maritime" in nature and asserted that as against the United States they were cognizable by virtue of the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*, Rule 9(h) of the Federal Rules of Civil Procedure (relating to admiralty claims), and the Death on the High Seas Act, 46 U.S.C.

761, *et seq.* (Pet. App. A, 2). The government moved to dismiss the amended complaint on the ground, *inter alia,* that insofar as it alleged maritime claims against the United States it was cognizable only under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.,* and was barred by the two-year statute of limitations prescribed by that Act, 46 U.S.C. 745 (Pet. App. E, 8-9). The district court entered an order denying the motion (Pet. App. B, 1-2). On interlocutory appeal, the the court of appeals reversed the order of the district court because "to the extent that the appellees' claim is cognizable in admiralty, it is governed by the Suits in Admiralty Act and absolutely time-barred by § 745 of that Act" (498 F. 2d at 527; Pet. App. A, 10).

The decision of the court of appeals is correct, and consistent with the decisions of every other court of appeals which has considered the question. Therefore, further review by this Court is not warranted.

1. Prior to 1960, maritime actions against the United States under the Suits in Admiralty Act were limited by the language of 46 U.S.C. (1958 ed.) 742 to those involving merchant vessels owned by or operated for the United States, and the cargo of such vessels.[1] Accordingly, prior to 1960 most courts permitted plaintiffs with maritime tort claims against the United States which did not involve vessels or cargo to proceed under the Federal Tort Claims Act. *E.g., Somerset Seafood Co.* v.

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[1]Prior to 1960, 46 U.S.C. (1958 ed.) 742 provided in relevant part:

> In cases where if such vessel [owned by or operated for the United States] were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * *.

United States, 193 F. 2d 631 (C.A. 4); *Blumenthal* v. *United States*, 189 F. Supp. 439 (E.D. Pa.), affirmed, 306 F. 2d 16 (C.A. 3). However, in 1960 Congress amended the Suits in Admiralty Act, 46 U.S.C. 742, to permit maritime actions against the United States "if a private person or property were involved" (Pet. App. E, 5-6).[2] The Fifth Circuit, in an opinion written by Chief Judge Brown, and the Second Circuit, in an opinion written by Judge Friendly, have both properly interpreted this amendment as enlarging the scope of the Suits in Admiralty Act to include non-vessel maritime tort actions against the United States. *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 144 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 169 (C.A. 2). This interpretation, which was adopted by the court of appeals below, has been followed by all but one of the district courts which have considered the matter. *T.J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1212, 1219-1220 (S.D. N.Y.); *Utzinger* v. *United States*, 246 F. Supp. 1022 (S.D. Ohio); *Tankrederiet Gefion A/S* v. *United States*, 241 F. Supp. 83, 85 (E.D. Mich.); *Tebbs* v. *Baker-Whitely Towing Co.*, 227 F. Supp. 656,

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[2]The present version of 46 U.S.C. 742 is, in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, *or if a private person or property were involved*, a proceeding in admiralty could be maintained, and appropriate nonjury proceeding in personam may be brought against the United States * * *. [Emphasis added.]

657-658 (D. Md.); *Beeler* v. *United States*, 224 F. Supp. 973, 975-976 (W.D. Pa.), reversed on other grounds, 338 F. 2d 687 (C.A. 3).[3] Accordingly, the holding of the court of appeals that petitioners' wrongful death action against the United States, to the extent it is maritime in nature,[4] was cognizable under the Suits in Admiralty Act,[5] is supported by the overwhelming weight of authority.[6]

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[3]The only reported decision to the contrary is *J.W. Petersen Coal & Oil Co.* v. *United States*, 323 F. Supp. 1199 (N.D. Ill.). However, the district court in that case did not cite any supporting authority for its interpretation of the 1960 amendment and its decision has not been followed by a single court.

[4]In the court of appeals the government disputed whether petitioners' claims were indeed maritime in nature. As the court of appeals pointed out, if they were "land" claims, they were barred by the "foreign country" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(k), because they arose in Okinawa (498 F. 2d at 522; Pet. App. A, 3). The court of appeals found it unnecessary to explicitly rule on this issue in view of its ultimate disposition (498 F. 2d at 525; Pet. App. A, 6), but it may be assumed for purposes of this petition that petitioners' claims are maritime in nature.

[5]Although petitioners also based their action on the Death on the High Seas Act, that Act does not authorize suit against the United States, and any cause of action it creates may be asserted against the United States only through the Suits in Admiralty Act.

[6]Petitioners' contention that the decision below conflicts with the decision of the Third Circuit in *Blumenthal* v. *United States*, 306 F. 2d 16, is erroneous. The complaint in *Blumenthal* was commenced *prior* to 1960 under the former version of 46 U.S.C. 742, and the Third Circuit in 1962 merely affirmed the decision of the district court that under the former version of 46 U.S.C. 742 a non-vessel maritime tort action against the United States could proceed under the Federal Tort Claims Act.

Since petititoners' complaint was cognizable under the Suits in Admiralty Act, it was not cognizable under the Federal Tort Claims Act, which is specifically not applicable to "[a]ny claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States." 28 U.S.C. 2680(d).

2. Maritime actions under the Suits in Admiralty Act must be brought within two years from the date of alleged injury. 46 U.S.C. 745. See *McMahon* v. *United States*, 342 U.S. 25. It is undisputed that the alleged injury in this case occurred on July 27, 1970, and that petitioners commenced suit more than two years later, on November 21, 1972. Since "[t]he time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable, but extinguishes the claim itself," *States Marine Corp. of Delaware* v. *United States*, 283 F. 2d 776, 778 (C.A. 2), the court of appeals correctly ruled that petitioners' complaint should have been dismissed by the district court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.